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No. 84-1907

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

KAISER ALUMINUM & CHEMICAL CORPORATION and
KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners,

v.

JOSEPH A. BONJORNO, GEORGE M. KERR, and
BARBARA K. CLISBY,
Respondents.

SUPPLEMENTAL BRIEF FOR RESPONDENTS OCCASIONED BY THE FILING OF AN AMICUS CURIAE BRIEF ON BEHALF OF THE UNITED STATES

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1. INTRODUCTION

The Solicitor General has correctly concluded that certiorari should be denied in this twelve-year old antitrust case because:

> ¶ Resolution of the price squeeze issue (the only issue presented) turns, not on a question of law, (as wrongly contended by Petitioners), but on the sufficiency of the evidence.[1] (Gov's Brief, (typescript) p. 10) The govern-

[1] It is significant that the government describes the "Question Presented" as one of the "sufficiency of the evidence"—which this Court has held is not an appropriate ground for exercise of its certiorari jurisdiction. *Graver Tank and Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949), *Berenyi v. Immigration Director*, 385 U.S. 630, 635 (1967). *See also*, Stern, Gressman, Shapiro, *Supreme Court Practice* 217, 220 (1986).

ment agrees that the Court of Appeals applied the correct legal standards to the facts. (Gov's Brief pp. 15-16)

¶ The price leadership aspect of the price squeeze issue is not of "sufficient importance" to warrant review because price squeeze cases are "relatively rare." (Gov's Brief p. 19)

¶ Resolution of the price squeeze issue would *not* be case dispositive, because "A determination that the price squeeze evidence cannot support Columbia's theory of liability does not render the other evidence insufficient to support the jury's verdict." (Gov's Brief p. 21) The Court of Appeals agreed there was significant evidence of other retaliatory, anti-competitive conduct violative of Section 2 of the Sherman Act which was independent of the price squeeze, Pet. App. A-19, and which resulted in the destruction of Respondent's small family business.

¶ The sufficiency of the non-price squeeze evidence is not "fairly included" within Petitioner's Question Presented for purposes of this Court's Rule 21.1a.[2] (Gov's Brief p. 20)

Further reasons for denying the Petition are discussed in Respondent's brief in opposition to the Petition for Writ of Certiorari and may be summarized as follows:

¶ Many of the arguments raised in the Petition were not preserved by Petitioners for appellate review. (pp. 14-17)

¶ Criticism of the *Alcoa* case (*United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir., 1945)) is not germane to the instant case because the conduct challenged in this case is not comparable to that in *Alcoa* and because the record in this case contains abundant evidence

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[2] "Only the questions set forth in the petition or fairly included therein will be considered by the Court." U.S. Sup. Ct. Rule 21.1(a), 28 U.S.C.A. *See, Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348, 1352 (1986) (Antidumping Act claims that were not mentioned in the questions presented in the petition for certiorari nor independently argued by the parties were not reviewed by the Court).

of illegal anti-competitive retaliatory conduct, in addition to the price squeeze. (pp. 22-24)

¶ As cogently and recently pointed out in this Court's unanimous decision in *Aspen Skiing Co. v. Aspen Highlands Corp.*, 105 S.Ct. 2847 (1985)—traditional rules of freedom of choice for a competitor with monopoly power are *qualified* rights, not *absolute.* Thus, a monopolist may not abuse its power by excluding smaller competitors from a market it dominates through a series of hostile and anti-competitive acts. (pp. 19-21)

¶ The opinion of the Court of Appeals presents no conflict among the circuits. There is no conflict with any prior decision by this Court. (pp. 12-13)

¶ It has been more than five years since a jury fixed damages. The proceedings below document the extraordinary and personal hardships that the delays in this case, and denial of fair compensation for the damage inflicted, have visited on the Respondents.

2. There Was Convincing And Unchallenged Expert Testimony And Abundant Evidence Of Kaiser's Control Over The Price Of The Raw Product (Coil) Used By Columbia To Manufacture Pipe

The government's brief acknowledges, (and thereby repudiates Petitioners' contrary contention) that the Court of Appeals specifically held that for Plaintiff to prove a price squeeze it had to establish that Kaiser had control over both the raw material price and the finished product price. Pet. App. A-14-18.[3]

The government's brief only questions "the sufficiency of the evidence" on whether Kaiser's control over raw material

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[3] The Court of Appeals stated:

"The mere existence, however, of a "price squeeze" is not necessarily an antitrust violation. The plaintiff must present evidence that the defendants *deliberately produced the effect,* sufficient to provide a reasonable basis for the jury to conclude that the "squeeze" was *not the result of natural market forces* such as supply and demand or legitimate competition." Pet. App. A-14. (752 F.2d at 809.) (Emphasis supplied.)

prices could be found from evidence of price leadership in the raw material market. However, Plaintiff did not rely on price leadership alone to show that Kaiser exercised control over raw material prices. The government's brief overlooks some important evidence, discussed below, in addition to the evidence of price leadership, that the Court of Appeals relied upon in its opinion, see Pet. App. A15-A18:[4]

(1) Kaiser clearly had market power over aluminum coil used to make pipe. Pet. App. A-15.[5]

(2) The evidence showed "that the squeeze was not caused by natural market forces." Pet. App. A-17.

(3) The evidence demonstrated that Kaiser manipulated coil prices for "strategic reasons", (i.e., conduct not based on rational economic grounds and thus against economic self interest).[6] Pet. App. A-18.

(4) Testimony by a Kaiser manager supported an inference that changes in coil prices at the outset of the price squeeze in early 1974 was not related to cost but was intended to affect the independent competition, i.e., Columbia Metal. Pet. App. A-17-18.

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[4] This omission demonstrates precisely why this court should be extremely chary of being drawn into a detailed review of the evidence. Cf. *Matsushita Electronic Industrial Co. Ltd. v. Zenith Radio Corp.*, 106 S.Ct. 1348, 1351 (1986):

> "... we review only the standard applied by the Court of Appeals in deciding this case, and not the weight assigned to particular pieces of evidence."

[5] Kaiser does not dispute it had more than an 80% share of the market for the raw material used for aluminum culvert pipe. Kaiser's own documents showed it had over 80% of the nationwide sales for culvert coil for all the relevant years, C.A. App. 8076-79a, and there was uncontradicted evidence which showed that Kaiser enjoyed over 75% of sales of aluminum coil in the relevant geographical market in this case. App. 4839a.

[6] Cf. *Matsushita*, supra, at 1356-62, where plaintiffs failure to show conduct against economic interest was held to preclude permitting the trier of fact to infer a conspiracy.

(5) The evidence in the record allowed the jury to find Kaiser knew it could impact Columbia's coil prices even though Kaiser was not at that time selling to Columbia. C.A. App. 2627a-2628a, 4826a.

The Court of Appeals review of the evidence also finds full support in the testimony of Respondents' expert, Dr. Oliver Williamson, formerly special economic assistant to the Assistant Attorney General in charge of the Antitrust Division and presently Professor of Economics at Yale University. Dr. Williamson had studied the aluminum industry, including the Government's Council of Wage and Price Stability study, C.A. App. 595a-596a, and concluded it was a classic oligopoly [7] in which Kaiser was the dominant seller of aluminum coil and pipe. Dr. Williamson testified that the totality of Kaiser's actions, including its complete withdrawal of the "commodity" list price for aluminum coil, and its refusal to sell to Columbia Metal, showed that this was done for "strategic purposes", C.A. App. 646a.—i.e., for the purpose of "disciplining existing and potential rivals." (C.A. App. 644a). Petitioner's counsel made no effort to strike any portions of Dr. Williamson's testimony, nor was any expert called to refute his testimony.

The Court of Appeals also relied on the fact that the price of pipe (the finished product) was often *below* the price of coil (the raw material) at the outset of the price squeeze, during the first six months of 1974. It justifiably concluded from this bizarre pricing relationship, never explained by Kaiser, that "either the pipe prices were too low or the raw material prices

[7] There is no record support for the suggestion in the Government's brief that other suppliers of coil would welcome the opportunity to sell coil to Columbia Metal at a cheaper price than Kaiser's published list price. The record shows that Alcoa refused Columbia Metal's pleas for lower prices, C.A. App. 1447a-48a, 4594a, and also that there were no price reductions in spite of excess capacity. C.A. App. 596a.

The government's citation of evidence that Alcoa and Reynolds offered cheaper prices than Kaiser refers to the early years of Columbia existence.

In the crucial period relevant to this case, 1971 on, the prices of Alcoa and Reynolds followed Kaiser, and were *identical* to Kaiser's prices for coil. C.A. App. 241, 8080a.

were too high." Pet. App. A-18. The Court of Appeals noted further evidence that the price squeeze was deliberate because of the transfer price system used by Kaiser, because Kaiser's coil prices were followed by its competitors (i.e., Alcoa and Reynolds), and thus impacted fabricators purchasing from Kaiser's competitors, but did not affect Kaiser's own pipe costs. Pet. App. A-18.

After reviewing this and other evidence addressed by the parties, the Court of Appeals found:

> "Given these facts there was sufficient evidence for the jury to conclude that Kaiser not only possessed the power to create the price squeeze, but that it exercised that power to destroy its competition". Pet. App. A-18-19.

This Court should not grant certiorari to retread this same ground and to further dissect the factual record in this complex case, as that work has already been adequately and fairly done by the Court of Appeals.

3. Significant Other Evidence, Unrelated To The Price Squeeze, Showed Pervasive Unfair and Unlawful Willful Retaliatory Acts Which Caused Or Contributed To The Destruction Of Respondents' Business

The government's brief correctly recognizes that in addition to the price squeeze evidence, the Jury found the abuse of monopoly power by unfair and unlawful willful conduct, to drive a smaller independent company out of business. This evidence is sufficient to support the judgment below. (Gov's Brief, p. 21).

The Court of Appeals noted that plaintiff did not solely rely on the price squeeze evidence:

> "The plaintiffs' basic injury was that Columbia was driven out of business. Further, the theory of the Section 2 violation here is not that any one act in itself is unlawful, but that all the acts taken together show the willful acquisition or maintenance of a monopoly which damaged and forced Columbia out of business." Pet. App. A-24.

We reviewed in our Brief In Opposition to the Petition for Writ of Certiorari, at pages 17-19, Kaiser's intentional, strategic conduct which the jury could and did find was designed to destroy Columbia. That evidence was sufficient to support the verdict without regard to the evidence of the price squeeze.

Under *Aspen Skiing Co. v. Aspen Highland Corp.*, 105 S.Ct. 2847 (1985), once Columbia introduced evidence sufficient to show that Kaiser had monopoly power in a relevant product market, and adopted exclusionary practices which excluded competition, there was sufficient evidence to prove the offense of monopolization.

The summary which follows demonstrates Kaiser's pervasive unfair and unlawful retaliatory conduct, goes well beyond the boundaries of "aggressive competition" (Gov's Brief typescript p. 20):

1. Kaiser refused to sell Columbia raw material after Columbia insisted on also buying from Reynolds, which is an important fact supporting the jury's verdict.[8] *Aspen Skiing, supra, Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973).

2. Kaiser's manager of its Highway Products Division threatened to open a Kaiser pipe fabricating plant "across the street" from Columbia, if Columbia bought its raw material from any supplier other than Kaiser.

3. Kaiser, within one year after the Holmes Collins threat, established its plant forty miles from Columbia, which the jury could have found and presumably did find was conduct against its economic self interest.[9]

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[8] Dr. Williamson pointed out in his testimony that a refusal to sell is a more serious restraint than a sharp increase in price. He concludes that a refusal to sell, *plus* an increase in price, with "the leadership/followership condition that existed in this industry . . . is a very severe kind of supply condition to confront an independent fabricator with." C.A. App. 649a.

[9] The record showed that the entire Eastern Seaboard north of Florida did not have another culvert pipe manufacturer specializing in aluminum, and that Kaiser had been actively considering a plant elsewhere in a place more central to its entire market. (C.A. App. 1593a, 1600-01a, 1791a). Cf. *Schine Chain Theatres Inc. v. United States,* 334 U.S. 110, 119 (1948).

4. Kaiser's intent to exclude independent fabricators such as Columbia from the aluminum culvert pipe market was further carried out by anti-competitive threats to Alcoa, the principal competitor of Kaiser, and to another pipe fabricator dependent on Kaiser as a source of supply. (C.A. App. 1085a, 759a-63a).

5. Because of Kaiser's "aggressive" pricing and strategy of dominance in the aluminum culvert market, Alcoa decided not to enter that market, either as a fabricator of pipe itself, or as a regular supplier to independent fabricators such as Columbia. (C.A. App. 4994a).

6. Kaiser's recruitment of Kennedy (Columbia's star salesman) as a Kaiser distributor, and giving him great financial incentives, was additional evidence as detailed below, showing Kaiser sought to destroy Columbia, Pet. App. A-19:

(a) Kaiser's payment of a finder's fee to Kennedy *while he was still employed by Columbia* (App. 1712a-1713a, 4437a-4438b);

(b) Kaiser's approval of a joint check arrangement with Kennedy, by which Kennedy could make sales in excess of his credit allowance (App. 2922a-2923a, 3074a-3077a);

(c) Kennedy's admission that Kaiser controlled Kennedy by controlling the amount of credit he had (App. 2871a);

(d) Kaiser discussed with Kennedy the prices at which Kaiser would sell, *while Kennedy was still a Columbia employee* (See 579 F.2d at 35, n.55, and Exhibits P-76, App. 4467a, P-78, App. 4469a, 1684a-1689a, 1695a-1696a);

(e) Kennedy did not become a distributor until Kaiser opened the New Castle plant, because it was not until then that Kennedy would be able to buy pipe at a low enough price to resell it at a profit in competition with Columbia. (App. 2912a);

(f) Notwithstanding that Kennedy had a credit line from Kaiser of $25,000, Kennedy's financial statement at the end of his first year, as of April 30, 1974, showed that he owed Kaiser over $75,000. (App. 2926, 4448-a-4452a);

(g) Kennedy *used Columbia's confidential information* to get bids which benefited Kaiser, App. 2888a-2889a, 221a-233a);

(h) A Kaiser manager, testified that Kaiser made more profit selling directly with its own sales force than through a distributor. App. 1682a. From this fact alone, the jury could infer improper motive by Kaiser because its strategy, to build up volume rather than profit by selling through Kennedy, who knew Columbia's customers, was against Kaiser's economic interests; [10]

7. Kaiser's "lowball" pricing practices in Southern New Jersey, compared to other areas in which Kaiser was not competing against Columbia, warranted the jury in finding the intent to monopolize.[11]

In summary, less than one year after Columbia had asserted its right to purchase products from other suppliers, Kaiser opened the New Castle plant, hired away and set up Columbia's best salesman as a Kaiser distributor, withdrew the commodity price for raw material, and sold pipe at drastically lower prices in Southern New Jersey. Columbia started business for its 1974 year as a strong, viable competitor; it ended the year dormant, lifeless, destroyed.

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[10] Some of the Kaiser documents concerning Kennedy are probative evidence of the intent to destroy Columbia. (See P-5, App. 4435a, P-24, 4461a, P-75 App. 4464-4466a).

[11] Kaiser sold pipe from its New Castle plant at drastically lower prices in Southern New Jersey, where Kaiser was in direct competition against Columbia, than it did when competing in other locations. Since Kaiser presented no economic justification whatsoever for its lower pricing practices in Southern New Jersey, the jury was free to conclude that this further evidenced Kaiser's intent to destroy Columbia.

4. Conclusion

Litigation must come to an end some-time. This case is now 12 years old. Kaiser has had three trials and two appeals. It has had two trips to this Court. It has been represented by experienced counsel at each juncture, and has presented all its factual arguments to the juries and to the lower courts. Both the juries and the lower court judges who have painstakingly reviewed the masive record in this case have rejected Kaiser's fact-bound arguments in each instance.

The record below documents the extraordinary personal hardship that the delays in this case have visited on the respondents.

It has been more than thirteen years since Kaiser began its retaliatory exercise of monopoly power that ultimately destroyed this small, successful and expanding family business.

It has been more than seven years since a jury decided all factual issues in respondent's favor and rendered a liability verdict on all issues against the defendant/petitioners.

It has been more than five years since a jury fixed damages.

It has been more than one and a half years since the Court of Appeals reinstated the original judgment.

For all the foregoing reasons, we respectfully ask that the court promptly consider and deny the Petition for Writ of Certiorari. It is now time for the parties, and the judicial system, to move on to new business.

Respectfully submitted,

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